

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 55606-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
SCOTT RUSSELL NORD,)	
)	
Appellant.)	FILED: July 31, 2006

GROSSE, J. – The evidence of malice is insufficient as a matter of law where the facts demonstrate that a defendant's only act was to cut down a gate erected in spite to block access to his easement, and his lesser attempts at access were unavailing.

FACTS

This is the review of a conviction for malicious mischief that arose from a dispute between neighbors. Scott Nord purchased a waterfront home in Everett in 1979. Donald and Susan Wright purchased the adjacent waterfront property in 1998. Both of the properties slope away from the street down towards the water. Before either of the neighbors purchased their homes, a garage was built on the upper portion of the property now owned by Nord. The garage encroached on a small portion of the property owned by a predecessor of the

Wrights. In June of 1966, an easement was negotiated, executed and recorded between the then-owners of the two properties. Predecessors of the Wrights conveyed an easement for the use and maintenance of the existing garage to the predecessors of Nord, and their successors and assigns. The easement terminates upon removal or demolition of the garage, which has not occurred.

Nord and the Wrights were on friendly terms after the Wrights moved in. But over the years a number of issues arose between the neighbors, mainly concerning trees on the Nord property that, if topped or trimmed, enhanced the Wrights' view. Nord trimmed some of the trees, but left others to protect his privacy. Other issues regarding water lines, watering along the property line, drainage, and access to the garage arose over the years. The neighbors argued over many things.

The Wrights knew of the easement, but proceeded to have a "spite fence" constructed between the properties. The fence was built in part on the Nord property. In addition, the Wrights had a gate built between their house and the Nord garage on the street-side upper end of the property. A strong padlock was placed on the gate. When locked, the gate effectively denied Nord access to his easement.

While the fence was being built, Nord spoke with Don Wright and asked about access to the area between the houses. Wright replied that Nord's easement was only an encroachment, which did not allow Nord access and stated that the Wrights would lock the gate, unless something could be worked

out with regard to the trimming of the trees. Nord called the fence company a number of times and informed it that a portion of the fence was being built on his property and that he would tear it down if it was not moved. The fence company and the Wrights ignored Nord. On June 27, 2003, the fence was completed and the gate was locked.

That evening Nord used a special power saw to cut down a number of fence posts that encroached on his property. He also attempted to cut the padlock off the upper gate, but for a number of reasons was unsuccessful. So instead, Nord cut the gateposts holding the gate between the buildings on the upper portion of the properties. After the gateposts were cut, the gate rolled into the side of the Wright house. There was cosmetic paint damage to the house and additional damage to a downspout and gutter on the Wright home. The damage to the gateposts and house was estimated to be more than \$250.

Even though the Wrights heard a “thud” against their house that evening, they did not seek to determine the cause other than by one of them going to a door and looking out. It was not until the following day that the Wrights discovered that the gate had been dislodged and some of the fence posts had been cut. It was then that the Wrights contacted the police.

The office of the Snohomish County prosecutor charged Nord with second degree malicious mischief, a class C felony, pursuant to RCW 9A.48.080(1)(a).¹

¹ RCW 9A.48.080(1)(a) states:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

Before trial, Nord moved for a bill of particulars “identifying with specificity the property Scott Nord is alleged to have damaged that is part of the charged offense.” Neither Nord nor counsel sought clarification of the definition supporting “knowingly and maliciously” in the charge.² The prosecuting attorney responded by filing a voluntary bill of particulars, indicating in part:

That on or about June 27th or June 28th of 2003, the defendant, Scott Nord, did knowingly and maliciously cause physical damage in excess of \$250 to the property of another, to wit: a fence, cement footing, steel posts of the fence, the downspout getter [sic] and paint on the garage or gutter.

At trial, Nord admitted he removed the gate by cutting the gateposts but justified his actions by claiming he did it to gain access to his easement. The trial court indicated this may have been a part of his reason but found that Nord’s primary reason for cutting the gateposts was to spite his neighbors. The trial court acknowledged that the neighbors also acted with spite by building the fence and gate in the first place.

A different neighbor testified that he saw Nord kneeling down attempting to cut down the gate or posts, but went inside his own home before the gate was removed. Nord denied throwing the gate against the Wrights’ garage or house

(a) Causes physical damage to the property of another in an amount exceeding two hundred fifty dollars[.]

² The relevant portion of RCW 9A.04.110(12) defines the terms “malice” and “maliciously”:

“Malice” and “maliciously” shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty[.]

and testified that after he cut the posts, the gate leaned over and then fell downhill towards the Wright house, the normal direction considering the slope. There were no other witnesses as to how the gate ended up hitting the Wright home.

Following a bench trial Nord was convicted of malicious mischief in the second degree. The trial court included findings and conclusions in its oral ruling. The court found the gate and fence were erected by the Wrights primarily to spite Nord. The court found that the fence was erected mainly on Nord's property, so there was no criminal liability when Nord cut down the lower portion of the fence. But the court inferred from the "thump" heard inside the Wright home that Nord threw the gate against the Wrights' garage and house. The trial court held that the cost to repair the gate and the damage to the Wrights' house exceeded \$250. Further, the court concluded that Nord's "willful and unlawful" action that caused damage to the gate and to the side of the house was disproportionate to anything necessary to exercise his right of easement, and that this established the requisite mens rea element of malice, especially when coupled with Nord's continuing pattern of behavior towards the Wrights as testified to by others at trial.

Nord moved for a new trial and arrest of judgment. In making this motion Nord claimed he was acting lawfully when he cut down the gate because he had a right to gain access to the outside of his garage by easement. Due to this right Nord asserts he could not be found to have acted with malice. Nord also

claimed that the finding and conclusion relating to his tossing the gate against the Wrights' house was unsupported by the evidence.

The trial court denied Nord's motion, reiterating that the State met its burden of proving that Nord was not legally justified in cutting down the gate and that he acted maliciously in doing so.

Nord appeals the judgment and sentence along with the findings and conclusions of the trial court. The State cross-appealed, but later withdrew it.

ANALYSIS

Nord argues there is insufficient evidence of malice to support the conviction. Nord asserts that under the facts and pursuant to his easement he had a right to enter on the Wrights' property and cut the gate down. He argues he attempted to gain access by other means, by cutting the lock off the gate, but that this attempt proved futile. Thus, Nord claims he was acting within his legal rights when he cut down the Wrights' locked gate because it was an unreasonable burden upon the easement. We agree.

In reaching its conclusion that Nord's removal of the locked gate exceeded his right of entry, the trial court failed to fully consider Nord's right of entry under the easement. The reasoning from the case of Rupert v. Gunter³ is instructional. There, the court determined whether a trial court abused its discretion in allowing defendants to construct a gate across the entrance to an easement. As here, the original grant of the easement did not state whether a

³ Rupert, 31 Wn. App. 27, 31, 640 P.2d 36 (1982).

gate could be erected across it. But in Rupert, as here, there is no dispute that the gate built created a greater burden than that originally contemplated by the easement grant.

When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use.^[4]

The Wrights own the land on which the easement is located and have the right to use their land for any purpose not inconsistent with its ultimate use for reserved easement purposes. But the Wrights do not have the right to unreasonably interfere with Nord's use of the easement. By locking the gate the Wrights unreasonably interfered with the easement and Nord had a right to gain access. While it may have been more thoughtful, there is no requirement that Nord had to resort to other legal process before attempting to gain access to his easement.

Where a trial court has weighed the evidence, review is limited to determining whether its findings are supported by substantial evidence and, if so, whether the findings support the conclusions of law and judgment.⁵ Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise.⁶ The party challenging the finding

⁴ Rupert, 31 Wn. App. at 31 (emphasis added); see also Colwell v. Etzell, 119 Wn. App. 432, 439, 81 P.3d 895 (2003).

⁵ Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000).

⁶ Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549

bears the burden of showing that it is not supported by the record.⁷

(1992).

⁷ Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998).

Nord claims the trial court erred by convicting him because the State failed to carry its burden of proof on the finding of the crucial element of malice, and the pertinent conclusion of law. The finding that Nord believed he had a right to access the easement, which was one of the recognized purposes for cutting the gate, coupled with his right of reasonable access, are tantamount to a determination that the State failed to prove the element of malice beyond a reasonable doubt. There is insufficient evidence to prove the element of malice.

At oral argument, the State conceded that in order to support a finding of malice, the case turns on the gate hitting the house, and whether the finding and conclusion that Nord threw or tossed it can be affirmed. The State argues the finding is supported by substantial evidence. We disagree. The trial court's finding that Nord "threw" or "tossed" the gate at the Wrights' home is not supported by any evidence. The only direct evidence regarding this matter was from Nord himself, who admitted he cut the gateposts, and that it rolled downhill. But Nord added that he did not throw or toss the gate at the Wrights' house or garage. The trial court inferred from a thump heard from inside the house by the Wrights that Nord must have thrown the gate, thus it was this action that supported the finding of malice. But the thump was not so great that the Wrights even went outdoors to look at what caused it. There is a complete dearth of testimony that Nord threw the gate. Thus, substantial evidence does not exist to support the finding that Nord threw or tossed the gate against the Wrights' house. Thus, as conceded by the State at oral argument before us, a finding or

conclusion that Nord acted with malice cannot be supported by the evidence in the record. As such, the conviction must be reversed.

Nord also claims the statute prohibiting malicious mischief is unconstitutionally vague as applied to him because the term “evil” in the supporting statutory definition of malice or maliciously is unconstitutionally vague. This court may decline to consider a constitutional claim where we have decided the case on nonconstitutional grounds.⁸ Given our decision above, we need not reach the constitutional claim concerning the vagueness of the term “evil” or “evil intent” in the malicious mischief statute.

Grosse, J.

WE CONCUR:

Becker, J.

Baker, J.

⁸ In re the PRP of Roach, 150 Wn.2d 29, 38, 74 P.3d 134 (2003).